that Section 271 would prohibit all of the activities prohibited by the MFJ, unless the statute permitted them.[9]

Contrary to the argument made in U S WEST's Public Policy Web Page, Section 272(g)(2) of the Act, 47 U.S.C. § 272(g)(2), provides no basis for any different view. Section 272(a) establishes a "separate affiliate" requirement for most interLATA services that a BOC could be authorized to provide. Section 272(g)(2) states:

> Bell operating company sales of affiliate services -- A Bell operating company may not market or sell interLATA service provided by an affiliate required by this section within any of its in-region States until such company is authorized to provide interLATA services in such State under Section 271(d).

U S WEST maintains that "[t]here would be no reason for that specific prohibition of marketing an affiliate's long distance service if Section 271 prohibited a BOC from all marketing of long distance services." U S WEST Public Policy Web Page, p. 2 (Exh. 4).

But U S WEST is here refuting a straw man in an attempt to support a wholly nonsensical interpretation of Section 272(g)(2). No one has ever suggested that Section 271 prohibits a BOC from "all marketing of long distance services," for it plainly does not. Section 271(g), for example, permitted a BOC to begin providing, and therefore presumptively to market, several categories of "incidental"

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[9] Thus, the Conference Report describes the effect of Section 271 as follows:

> New section 271(b)(1) requires a BOC to obtain Commission authorization <u>prior to offering interLATA services within its region unless those services are previously authorized</u>, as defined in new section 271(f), or 'incidental" to the provision of another service, as defined in new section 271(g).

H. Conf. Rep. 104-458, at 147 (emphasis added).

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interLATA services on the day the 1996 Act was enacted. And Section 272(a)(2) provides that some of those incidental services -- those specified in Section 271(g)(4) -- may only be provided by the BOC through a separate affiliate. Section 272(g)(2) therefore has an obvious "reason." Until a BOC obtains long distance authorization in a state, § 252(g)(2) prohibits the BOC from jointly marketing with its affiliate those long distance services that Section 271 authorizes a BOC to provide before it obtains general long distance authority under Section 271 and that Section 272 requires the BOC to provide through that separate affiliate. By contrast, Section 272(g)(2) has no application whatsoever to the core (non-incidental) long distance services that Qwest provides and that U S WEST is prohibited from providing under Section 271(a). Because neither a BOC nor its affiliate can provide any such services at all prior to receiving authorization under Section 271 from the FCC, there has never been -- and could never be -- any issue regarding whether such non-existent BOC affiliate services may be marketed.[10]

The negative inference that U S WEST contends should be drawn from Section 272(g) -- that Congress meant implicitly to permit joint

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[10] Accordingly, U S WEST's assertion that "The FCC in its [Non-Accounting Safeguards] decision agreed that the language of Section 272(g) restricts only the BOCs' ability to market or sell interLATA services provided by an affiliate" is both true and completely irrelevant. U S WEST Public Policy Web Page, p. 2 (Exh. 4). Section 272(g)(2) is entitled "Bell operating company sales of affiliate services," and it restricts joint marketing "only" with respect to an affiliate's service because that is the only relationship it addresses. The FCC therefore correctly stated that Section 272(g) is "silent" on the marketing of non-affiliate's services prior to a BOC's receiving interLATA authority. The restrictions on U S WEST's marketing of Qwest's long distance service come not from Section 272(g)(2), but from Section 271(a) (prior to U S WEST's obtaining Section 271 interLATA authority) and, as the FCC explained in the very paragraph miscited by U S WEST, from Section 251(g). Non-Accounting Safeguards, 11 FCC Rcd. at 22047 ("equal access requirements pertaining to 'teaming' activities that were imposed by the MFJ remain in effect until the BOC receives section 271 authorization").

marketing with non-affiliates prior to a BOC's receiving general interLATA authority -- is further refuted by Section 274. Section 274(a) requires any BOC that seeks to provide electronic publishing through its own phone lines to do so only through a separate affiliate or joint venture. 47 U.S.C. § 274(a). Section 274(c)(1), like Section 272(g)(2), then establishes a general prohibition on joint marketing between the BOC and its electronic publishing affiliate. 47 U.S.C. § 274(c)(1). However, contrary to U S WEST's suggestion that such provisions alone carry a negative implication that joint marketing with unaffiliated entities is permissible and that no further statutory authorization is necessary, Congress went on expressly to authorize such joint marketing with non-affiliates in Section 274(c)(2)(A).[11] Section 274(c)(2)(A) shows that where Congress wished to authorize joint marketing with unaffiliated entities, it did so explicitly.

There is thus no support or logical basis for U S WEST's contention that Section 272(g)(2) sub silentio modifies the longstanding definition of "provide" in Section 271(a). To the contrary, Section 272(g) confirms the continuing validity of that

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[11] Section 274(c)(2)(A) provides:

> (2) Permissible joint activities
>
> (A) Joint telemarketing -- A Bell operating company may provide inbound telemarketing or referral services related to the provision of electronic publishing for a separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher: Provided that if such services are provided to a separated affiliate, electronic publishing joint venture, or affiliate, such services shall be made available to all electronic publishers on request, on nondiscriminatory terms.

47 U.S.C. § 274(c)(2)(A)(emphasis added).

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definition. It restricts the BOC's ability to engage in joint marketing with an affiliate prior to the date on which the BOC receives long distance authority under Section 271 (i.e., before the BOC has opened its monopoly markets to competition), but permits such joint marketing once a Section 271 application has been granted and those local markets have thus been held to have become competitive. Section 271(a) likewise restricts a BOC's marketing of other carriers' long distance services prior to, but not after, that same date. In both provisions, the statute ensures that during the period in which a BOC maintains its local monopoly it will not be able to use that monopoly to foreclose competition for those customers that would find one-stop shopping for local and long distance service attractive, and will not have the incentive to discriminate in favor of one long distance carrier and against others in providing its monopoly access services to them.[12]

B. U S WEST Is Violating The Equal Access Requirements Of Section 251(g).

The U S WEST/Qwest arrangement independently violates Section 251(g). Section 251(g) codifies the "equal access" requirements of pre-existing consent decrees, including the MFJ, "until such restrictions and obligations are explicitly superseded by regulations prescribed by the [FCC]." 47 U.S.C. § 251(g). The FCC has not yet

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[12] U S WEST's reliance for its contrary interpretation on an FCC order regarding a provision in Section 275 on alarm monitoring is baseless. U S WEST Public Policy Site, p. 2 (Exh. 4). Even if the statement in that order were assumed to be correct, section 275 is a different provision with a different history presenting far less serious competitive concerns. Even in that context, the FCC order holds that some marketing arrangements would violate § 275. See Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, 12 FCC Rcd. 3824, 3841-3842 (1997).

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adopted or even proposed any such regulations, and therefore, as the FCC has noted, "any equal access requirements pertaining to 'teaming' activities that were imposed by the MFJ remain in effect until the BOC receives section 271 authorization." Non-Accounting Safeguards, 11 FCC Rcd. at 22047.

The core theory of the MFJ depended upon removing the incentives for the BOCs to prefer the services of particular long distance carriers. The MFJ's equal access provisions reinforced this by strictly requiring, among other things, that statements BOCs made to local customers about long distance service ensured equal treatment among long distance carriers. See, e.g., United States v. Western Elec. Co., 578 F. Supp. 668, 676-77 (D.D.C. 1983). The FCC has reiterated that those requirements mandated then, and mandate now, "nondiscriminatory treatment" of long distance carriers. Non-Accounting Safeguards, 11 FCC Rcd. at 22046. They specifically require, for example, that BOC sales representatives receiving calls from customers to sign up for service provide those customers with the names "of all of the carriers offering interexchange services in [the BOC's] service area" in "random order." Id.

The MFJ Court repeatedly held that any arrangement in which a BOC marketed the services of long distance carriers violated these requirements. For example, the Court held that the issuance or marketing of calling cards that automatically routed interexchange calls to AT&T violated the equal access requirements of the MFJ. It explained that "[a]ny Regional Company advertising at this juncture will have the direct foreseeable effect of promoting AT&T services

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over those of the other interexchange carriers. This violates the nondiscrimination provisions of the decree." United States v. Western Elec. Co., 698 F. Supp. 348, 356 (D.D.C. 1988).

The arrangement between U S WEST and Qwest constitutes classic discrimination and "unequal access," and that is precisely why Qwest is willing to pay substantially for it. Qwest has not joined with U S WEST because U S WEST's sales representatives have any special marketing talents -- when you work for a monopoly, there is very little occasion to develop such expertise. Instead, Qwest is paying for preferential access to U S WEST's monopoly assets: (1) the ability to bundle its long distance service with U S WEST's monopoly local service and thus be the only long distance carrier to offer one-stop shopping; (2) the distribution channels and customer information U S WEST controls as a result of the fact that all residents and businesses in its area must contact it for local service; and (3) the corporate endorsement of the monopoly local provider.[13] Qwest also has created a situation in which U S WEST will have an incentive to provide it with preferential exchange access services, and to degrade the services provided to rival carriers, in order to promote Qwest's position in the marketplace -- and in which those rivals will have to expend substantially more resources monitoring U S WEST to determine whether and to what extent such preferences are being granted.

U S WEST concedes, as it must, that the equal access requirements

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[13] Indeed, by asserting that any offering that it markets must be equal or lower in price to Qwest's, U S WEST is implicitly declaring that higher-priced services are not offering sufficiently greater value to justify the difference. But the whole point of equal access was to ensure that customers would decide on a long distance carrier based on price, quality, and any other attribute that is important to them, without the BOC placing its thumb on the scale.

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of Section 251(g) "apply to the BOCs' communications with potential customers of the interexchange carriers." U S WEST Public Policy Web Page, p. 3 (Exh. 4). Nonetheless, U S WEST claims (id.) that it meets the exacting standards imposed by Section 251(g) because, it asserts, (a) the arrangement is open to any other long distance carrier that wishes to participate, and (b) the FCC approved a similar arrangement in the BellSouth Order.[14] Both of those claims are meritless.

1. "Open to Everyone." Although U S WEST has not publicly disclosed the full terms and conditions of its agreement with Qwest, it has stated that "[a]ny long distance carrier may participate in Buyer's Advantage under the same terms and conditions set forth in the contract."[15] That statement is a transparent sham for three reasons.

First, the very nature of the benefit conferred by the alliance -- preferred marketing status -- is inconsistent with broad-based participation by all interexchange carriers. U S WEST cannot recommend to its customers multiple participating carriers simultaneously. Thus, Qwest's CEO, when asked at his press conference how such multi-carrier participation could possibly work, understandably stated, "[t]o be perfectly honest with you, Alvin, I don't know how they'll do it." See Qwest Press Conference Transcript, p. 9 (Exh. 5).

Second, even if multiple-carrier participation were not self-contradictory, U S WEST has structured the arrangement so that only

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[14] See Memorandum Op. and Order, Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208 (Dec. 24, 1997).

[15] U S WEST Public Policy Web Page, p. 2 (Exh. 4).

one carrier will enjoy its benefits for at least a considerable period of time, and that carrier will thereby obtain a critical "first mover" advantage. Qwest itself has stated that U S WEST selected only one carrier for this coveted status and denied similar requests of other carriers. Id. at 4 ("Other long distance carriers competed for this opportunity and we're delighted that U S WEST selected us").[16] U S West stated that other long distance carriers could enter into the same arrangement if they were willing to agree to the same undisclosed terms that were secretly negotiated with Qwest only days before U S WEST launched a massive campaign on behalf of Qwest. See supra p. 15. Qwest recognizes the exceptional importance of this head start. Qwest's President thus stated that he was not concerned about U S WEST's statement: "time to market is very important here . . . since [Qwest's service] is the only offer that [U S WEST] ha[s], this is the one they will be marketing. If you have your distribution channels filled just on an offer, you know, first mover advantage in something this compelling is very compelling." See Qwest Press Conference Transcript, p. 9 (Exh. 5).

Indeed, the enormous value of that "first mover advantage" is assuredly reflected in the compensation that Qwest was willing to agree to pay U S WEST. Subsequent carriers that seek to join, by contrast, would be forced to pay the same price for only a fraction of the value, and none will therefore do so. That is another reason

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[16] Under the parallel equal access provisions of the GTE decree, the Court held that it was unlawful for GTE to conduct a competitive bidding to select one or more interexchange carriers that were deemed by GTE to offer the best value or to satisfy particular conditions and to offer access to that carrier or carriers on a preferential basis. See United States v. GTE Corp., 1988-2 Trade Cas. (CCH) ¶ 68,369, 1988 U.S. Dist. LEXIS 16525 (D.D.C. 1988).

why Qwest has no reason to be concerned: any paper offer by U S WEST to replicate the Qwest arrangement with others could not rationally be accepted by any competing long distance carrier. See McMaster Aff., ¶ 25.

Third and most fundamentally, even if there were some way to enable other carriers to obtain the same benefits as Qwest (which there is not), that could not cure the equal access violation. Equal access means equal treatment -- not an equal right to pay for favored treatment. A BOC may not use its monopoly power to extort payment from captive long distance carriers in return for special privileges. U S WEST has created a situation in which some carriers, if they are willing to pay for it, are "more equal than others."[17]

2. The BellSouth Order. Nor does the BellSouth Order remotely endorse this kind of arrangement. The FCC stated there that it believed it would be permissible for a BOC to recommend its affiliate's long distance offering to customers after the BOC had received approval to offer long distance service under Section 271. It noted that Section 272(g) grants the BOCs a statutory right to engage in joint marketing with their long distance affiliates once they receive long distance authority under Section 271, and that the equal access requirements, which "were written at a time when BOCs could not provide (and therefore could not market) long distance service," must be "balance[d]" against that "right." BellSouth Order

[17] See G. Orwell, Animal Farm 123 (Penguin Books 1972). Indeed, the reductio ad absurdum of U S WEST's "multi-tiered" approach to equal access would be if all long distance carriers felt compelled to participate in order to avoid being competitively disadvantaged, and therefore all paid U S WEST for the mere privilege of being treated equally -- which Section 251(g) guarantees as a matter of right.

¶¶ 237-238. It therefore approved an "inbound telemarketing" script in which BellSouth recommends its own affiliate's long distance service, but offers to read a list of other long distance carriers if the customer so desires. Id. ¶ 233.

U S WEST's claim (U S WEST Public Policy Page, p. 3 (Exh. 4)) that it can therefore use the same script today with an unaffiliated entity is a complete non sequitur. The FCC's order specifically applied to the period of time after the BOC had been found to have satisfied Section 271 by opening its local markets to competition, at which point the BOC will have lost the ability to foreclose competition either by (1) being the only carrier able to provide bundled local and long distance service, or (2) discriminating against interexchange carriers in the pricing and provisioning of monopoly exchange access services. As the FCC noted, the requirement that the BOC provide the names of long distance carriers only in random order were designed for a time "when BOCs could not provide (and therefore could not market) long distance service" (BellSouth Order ¶ 238) -- and until U S WEST satisfies Section 271, it will remain unable to provide or market such services and the requirements will remain appropriate.[18] Indeed, Section 272(g)(3) itself makes a similar distinction. It states that the "joint marketing . . . permitted under this subsection" will not be deemed to violate the nondiscrimination rules of Section 272(c). The "joint marketing permitted under this subsection" is joint marketing after the BOC has

[18] The fact that the FCC in that passage equated an inability to "provide" with an inability to "market" further confirms that "provide" is defined in this context to include marketing. See supra pp. 16-21.

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demonstrated satisfaction with Section 271.

Moreover, the FCC did not even suggest that it was altering the established definition of equal access, but rather made clear that it was "balancing" those obligations against the specific statutory right of those BOCs that had satisfied Section 271 "to market and sell services of their long distance affiliates." BellSouth Order ¶ 239; see also id. ¶¶ 231, 234, 237-238. It therefore determined either that there was a statutory exception to Section 251(g) that applied only after the BOC received interLATA authority, or that it should exercise its statutory authority to "supersede" the MFJ's equal access requirements to create this narrow exception. No such "balancing" would have been necessary if the equal access requirements, standing alone, did not prohibit such conduct, and the U S WEST/Qwest arrangement, unlike BOC joint marketing of affiliate services, is not supported by any statutory right that can be balanced against those requirements.

II. U S WEST'S JOINT MARKETING ARRANGEMENT WILL CAUSE IRREPARABLE INJURY TO AT&T, OTHER CARRIERS, AND THE PUBLIC INTEREST.

Unless a temporary restraining order or a preliminary injunction is issued against U S WEST's "Buyers' Advantage Program," it will irreparably harm AT&T, other long distance carriers, and also other firms that are seeking to take advantage of Sections 251-53 of the Act and compete with U S WEST's local monopoly service. In particular, these harms cannot be quantified and will be irreparable for the same reasons that first the MFJ and now Section 271 have prohibited U S WEST and other BOCs from providing long distance services while they have local telephone monopolies.[19] Indeed, U S WEST's conduct will irreparably harm competing carriers, and the public interest codified in Section 271, in several independent respects. The resulting increases in AT&T's and other carrier's costs, too, cannot be readily compensated by damages. Id. ¶¶ 30, 42. Lastly, the Qwest/U S WEST arrangement will irreparably harm actual or prospective competition for local telephone services by removing the incentive the Act provides to U S West to open its monopoly local exchange market to competition.

A. U S WEST's Endorsement And Marketing Of Qwest's Service In A Package With U S WEST's Local Monopoly Services Will Cause Competing Carriers To Lose Customers That Will Not Be Re-obtained After The Program Ends And Will Cause Harm To Competing Carriers' Goodwill That Cannot Be Adequately Compensated In Money Damages.

First, the Qwest/U S WEST marketing alliance will confer substantial and artificial competitive advantages on Qwest that will cause large groups of customers to leave AT&T (and other carriers) and use Qwest for reasons that have nothing to do with the price or quality of Qwest's service. In addition to revenues that AT&T will lose in the period before this court can make a final determination of the lawfulness of U S WEST's conduct, that conduct will harm AT&T's goodwill, reputation, and relationship with actual and prospective customers in ways that cannot be readily compensated by damages. McMaster Aff. ¶¶ 27-35.

As U S WEST has elsewhere stated, "harm to a company's

[19] It is well-established that where a plaintiff will "suffer[] substantial injury that is not accurately measurable or adequately compensable by money damages, irreparable harm is a natural sequel." Ross-Simons of Warwick v. Baccarat, Inc., 102 F.3d 12, 19 (1st Cir. 1996) (collecting cases).

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relationship with its customers is not readily compensated by damages and hence is irreparable."[20] In particular, courts have held that when unlawful marketing activities by a competitor will cause lost advertising efforts, defections of customers, and harm to a firm's goodwill with actual and prospective customers, the injuries cannot be readily quantified and are thus irreparable and sufficient to support grant of a preliminary injunction.[21]

If U S WEST's conduct is not enjoined now, its arrangements with Qwest will cause AT&T and other long distance carriers to lose not only existing customers, but also prospective customers that they would otherwise obtain during the period before there is a final determination of the lawfulness of U S WEST's conduct.

Qwest's own public statements illustrate the tremendous magnitude of the potential losses. In particular, although Qwest has not garnered any significant share of the market through its own independent efforts, Qwest's CEO has stated publicly that it could acquire 25-35 percent of the customers in U S WEST's service territory because of the arrangement with U S WEST, and that "our conservative estimate" is that the arrangement will increase Qwest's revenue by

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[20] U S WEST Motion for Stay Pending Judicial Review, U S WEST Communications v. FCC, Docket No. 97-3576 (8th Cir. Oct. 2, 1997).

[21] See Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc., 944 F.2d 597, 602 (9th Cir. 1991); see Gateway Eastern Ry Co. v. Terminal R.R. Ass'n, 35 F.3d 1134, 1140 (7th Cir. 1994) ("showing injury to goodwill can constitute irreparable harm that is not compensable by an award of money damages"); Basicomputer Corp. v. Scott, 973 F.2d 507, 512 (6th Cir. 1992) (finding of irreparable injury proper where "competitive injuries and loss of goodwill are difficult to quantify"). Here, there are multiple respects in which the benefits U S WEST confers on Qwest will injure competing carriers in ways that cannot be remedied adequately in a damages award.

$100-200 million in the first year alone.[22] These predictions, moreover, are consistent with experience in similar circumstances in which only one firm offered long distance service in a package with the local service of the incumbent monopolist. McMaster Aff. ¶ 28.

And, in addition to revenues lost while this case is pending, once a long distance carrier loses a customer it would otherwise retain or obtain, there is no subsequent marketing effort, alliance, or court order that can guarantee return of that customer after the U S WEST/Qwest alliance is declared unlawful. Id., at ¶ 30. AT&T and other carriers irretrievably lose not only the future revenue that all these customers would have generated, but also all of the goodwill and brand loyalty associated with the customer. It thus "follow[s] inexorably that neither the adverse impact on sales nor the concomitant insult to goodwill could be measured accurately." Ross-Simons of Warwick v. Baccarat, Inc., 102 F.3d 12, 20 (1st Cir. 1996).

Second, the U S WEST/Qwest alliance provides Qwest with a cost advantage over other long distance carriers that again derives solely from its relationship with U S WEST. The benefits of U S WEST's monopoly customer base, customer lists, and unique role as monopoly provider of local service will reduce its customer acquisition costs -- and Qwest's CEO has predicted that the U S WEST marketing alliance will "cut our customer acquisition costs by 50% . . . and give us access to 14 million customers in the U S WEST territory." "U S WEST Strikes Marketing Alliance With Qwest in Bold Move Skirting Rules," Wall Street Journal, supra, p. A2 (Exh. 3). No after-the-fact damages

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[22] Qwest Press Conference Transcript, pp. 2-3 (Exh. 5).

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award can reliably determine the amount of business that individual competing carriers lose because of U S WEST's wholly artificial reduction in Qwest's costs.

Third, the harms to AT&T and other carriers affect their relationship with prospective customers as well as their existing ones, for the advantages that Qwest anticipates are not limited to attracting new customers. Because it alone will be offering a package that is tied to local monopoly services and that no other long distance carrier can offer, Qwest has predicted that its marketing alliance will cut its "customer churn by 75%." Id. In an industry where over 56 million customers change long distance carriers annually, such a dramatic reduction in churn constitutes a major competitive advantage. McMaster Aff. ¶ 29. It further means that it will be far more difficult and costly for AT&T and other competing long distance carriers to attract the business of those prospective future long distance customers who have subscribed to the Qwest/U S WEST package of local and long distance service. Id.

Fourth, AT&T's and other carriers' relationships with existing and prospective customers will be harmed even in the case of those customers who do not immediately switch to the U S WEST/Qwest package. The mere fact that U S WEST is endorsing Qwest in advertisements and in outbound and inbound telemarketing calls to customers who today receive service from AT&T or other carriers, or may in the future receive service from these companies, would relatively damage AT&T's and other carriers' reputations and goodwill in ways that will impair their ability to obtain and retain customers even after the Qwest/U

S WEST relationship hereafter ends. Id. ¶¶ 31-35. Indeed, Qwest's CEO has stated U S WEST's endorsement and marketing of Qwest would strengthen Qwest's reputation and goodwill -- thus relatively weakening the reputation and goodwill of competing carriers. McMaster Aff., ¶ 34. These injuries to the reputation and goodwill of AT&T and other competitors epitomize the kinds of harm for which an injunction is the only effective remedy. See p. 33 n. 19, supra. Indeed, it was the inadequacy of after-the-fact damages remedies that was the reason for the prohibitions on the BOCs' endorsement and marketing of individual long distance carriers' services in the MFJ and now in Section 271 of the Communications Act. Id. ¶¶ 13-14.

Finally, Qwest has secured a competitive advantage that no carrier -- even one willing to participate in U S WEST's violation of the Communications Act -- can now attain at any price: the first mover advantage. Id. ¶ 25. In emphasizing the benefits of its alliance with U S WEST, Qwest's CEO stressed this point, stating, "[T]ime to market is extraordinarily important here. Also, since this is the only offer that [U S WEST] ha[s], this is the [only] one they will be marketing. . . . [F]irst mover advantage . . . is very compelling."[23]

The harm caused by Qwest's ability to be the first carrier to be promoted by U S WEST is alone sufficient to establish irreparable injury. In Mova Pharm. Corp. v. Shalala, __ F.3d __, 1998 WL 168710 (D.C. Cir. 1998), the Court affirmed a preliminary injunction based in part on the irreparable harm that would be caused to a drug company

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[23] Qwest Press Conference Transcript, p. 9 (Exh. 5).

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if the FDA were permitted to authorize its competitor to market a new drug first. It found the irreparable injury requirement to be satisfied because "the earliest generic drug manufacturer in a specific market has a distinct advantage over later entrants," and because the plaintiff "would find it extremely difficult to compete against the much larger [competitor] if [the competitor] got its product to market first." Id., at *5. In this case, there is no question that Qwest will gain a "distinct advantage" from its unique position as the first long distance carrier to be able to offer "one-stop shopping" with U S WEST. Further, because U S WEST is a monopoly provider of local service and has unparalleled access to the telecommunications customers in its territory, AT&T and other carriers who do not have a first-mover advantage will "find it extremely difficult to compete" against the joint U S WEST/Qwest offering.

B. The U S WEST Marketing Alliance Will Require AT&T And Other Long Distance Carriers To Incur Costs Of Monitoring U S WEST's Conduct And Will Cause Harms Resulting From Subtle Discrimination For Which Courts And Congress Have Determined There Is No Adequate Damages Remedy.

The U S WEST/Qwest arrangement will also subject AT&T and other long distance carriers to risks of subtle discrimination and to the costs of monitoring U S WEST's behavior that are the very reason that first federal courts and then Congress prohibited U S WEST and other BOCs from marketing or otherwise providing long distance services while they possess local monopolies. McMaster Aff. ¶¶ 36-42. Here, too, the MFJ and Section 271 represent determinations that there is no adequate after-the-fact damages remedy in this circumstance, and

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that only an injunction can prevent the resulting harms to competition from such arrangements.

The overriding fact is that the arrangement with Qwest would, unless enjoined, give U S WEST a direct financial stake in Qwest's success, because each additional customer that U S WEST signs up for Qwest will generate more revenue and profits for U S WEST. U S WEST thus has a financial incentive to do whatever it can to make Qwest's services as attractive as possible to prospective customers. Id. ¶¶ 36-37.

The history of the MFJ and the findings that led to its entry establish that there are a nearly infinite number of competitively significant ways in which U S WEST could use its local monopoly to discriminate in favor of Qwest, but that are, as a practical matter, unlikely to be detected -- much less proven. These range from giving Qwest advance notice of changes in the pricing and physical characteristics of U S WEST's monopoly facilities, to developing facially neutral access pricing plans that in fact favor Qwest, giving Qwest preference in establishing new access services or installing existing ones, using customer proprietary network information in marketing services for Qwest, making representations to individual customers that are improper, or offering improper "rebates" of access charges to Qwest through the marketing and related services that no other long distance carrier can obtain. In this regard, there is even now reason for AT&T and other long distance carriers to believe that U S WEST has already engaged in some such misconduct in its dealings with Qwest, and there is a clear risk that U S WEST will do so if the arrangement is not enjoined. Id. ¶¶ 37-41.

In all events, regardless of whether such discrimination actually occurs or can be proven, the effect of the U S WEST/Qwest arrangement will be to impose costs on AT&T and other long distance carriers that U S WEST and Qwest do not incur. In particular, while neither Qwest nor U S WEST face any risk of being discriminated against by the local monopolist in the U S WEST region, AT&T and other long distance carriers will face a substantial risk of such discrimination so long as U S WEST has a financial incentive to favor Qwest or any other individual long distance carrier. AT&T and other long distance carriers will thus have to incur substantial direct and indirect costs of monitoring U S WEST's behavior to try to ascertain whether they have been victims of any illicit discrimination or cross-subsidies and, if so, whether there is a remedy that can be pursued effectively. AT&T and other long distance carriers thus will incur the direct costs of dotting every "i" and crossing every "t" in dealing with U S WEST to eliminate any pretext for it to discriminate, of attempting to measure their treatment by U S WEST as compared to Qwest's in the pricing and provisioning of U S WEST's monopoly access facilities, of reviewing each and every tariff filing in U S WEST's 14 states to assure there is no hidden preference for Qwest, and of devoting substantial management time that should be spent on improving the quality or reducing the cost of services, rather than on these monitoring efforts. Id. ¶¶ 36-42.

It was because these artificial costs constitute a barrier to entry -- and because there was no other adequate remedy -- that the

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MFJ court and then Congress prohibited U S WEST and other BOCs from providing long distance services while they have local monopolies. These determinations establish that AT&T and other carriers will be irreparably harmed if U S WEST's arrangement with Qwest is not enjoined pending this court's final determination of the merits of plaintiffs' claims that this arrangement is unlawful. See Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc., 944 F.2d 597, 602 (9th Cir. 1991); Ross-Simons of Warwick v. Baccarat, Inc., 102 F.3d 12, 19-20 (1st Cir. 1996).

C. The Arrangement Is Against The Public Interest Because It Will Irreparably Harm Actual Or Prospective Local Services Competition And The Objects Of Sections 251-53 As Well As Section 271 Of The Communications Act.

Finally, because the U S WEST/Qwest alliance allows U S WEST to profit from the long distance business without opening its local markets to competition, it will, unless enjoined, irreparably harm AT&T and other carriers (such as McLeod, ICG, and GST) who are seeking effectively to compete with U S WEST's local monopolies, as well as substantially undermine a central objective of the Communications Act. Solomon Trujillo, the President of U S WEST Communications, has asserted that "[a] lot of us Bells are frustrated" by the need to meet a "cumbersome" checklist before providing local and long distance services.[24] This "cumbersome" checklist, however, contains the core market-opening requirements that a BOC must meet under Section 271 before it is permitted to offer in-region, interLATA services. See 47 U.S.C. § 271(c)(2)(B). Plainly, the U S WEST joint marketing

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[24] "U S WEST Strikes Marketing Alliance With Qwest in Bold Move Skirting Rules," Wall Street Journal, supra, p. A2 (Exh. 3).

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alliance is an effort to leverage the value of its local exchange monopoly into the long distance market while evading the fundamental market-opening requirements of the 1996 Act.

If U S WEST is permitted to bypass the competitive checklist and offer long distance service before it has opened its local markets to competition, the primary function of Section 271 -- to prevent BOCs from providing long distance service until they have opened their networks to competitors -- will be eviscerated. U S WEST will then be able to use its local monopolies to gain the very advantages that Section 271 was enacted to prevent.

Moreover, if U S WEST is permitted the benefits of in-region, interLATA entry without being required to open its local markets to competition, it will lose all incentive to open those markets in the future. It will be able to retain its local monopoly while reaping the benefits of its long distance marketing efforts, and competition in both long distance and local markets will be harmed. That will irreparably harm AT&T and other carriers who are seeking to compete with U S WEST in the local services market. McMaster Aff. ¶¶ 43-44.

III. A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION WOULD CAUSE NO UNDUE HARM TO OTHERS.

Finally, in contrast to the irreparable harm to AT&T, other carriers, and the public interest that will result in the absence of a stay, a stay will cause no undue harm to U S WEST or Qwest. As U S WEST has conceded, it would not have been permitted to engage in a joint marketing alliance with an interexchange carrier under the terms

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of the MFJ.[25] Thus, since the break-up of the Bell system in 1982, U S WEST could not and did not create the kind of alliance it has now forged with Qwest. During that time, U S WEST and Qwest have marketed and provisioned local and long distance service, respectively, without benefit of a joint marketing arrangement. It would strain credulity to suggest that any further delay in joint marketing during the pendency of this lawsuit would cause undue harm to either U S WEST or Qwest. Moreover, even if this conduct were later held to be permissible, U S WEST could earn the same per-customer payments in the future that are available today. During the pendency of the lawsuit, U S WEST stands only to lose the present value of Qwest's payments to it during the term of the joint marketing arrangement. None of the marketing opportunities it anticipates from its alliance will dissolve during this time.

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[25] AT&T Corp. v. U S WEST Communications, Inc., FCC File No. E-97-28, Opening Brief of U S WEST Communications, Inc., p. 13 (filed Sept. 17, 1997) ("[U]nder the MFJ in the Court's view, not only were BOCs prohibited from furnishing the physical transport for interLATA telecommunications services, but BOCs were also prohibited from selling, promoting, or marketing the interLATA services of an unaffiliated carrier.") (Emphasis added).

CONCLUSION

For the reasons stated, plaintiff's motion for a temporary restraining order or a preliminary injunction should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 1998, copies of the foregoing Comments of the Association for Local Telecommunications Services were served via first class mail, postage prepaid, or by hand as indicated to the parties listed below.

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